UNITED STATES OF AMERICA

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Weavers Cove Energy, L.L.C. and Mill River Pipeline, L.L.C.	**Docket Nos. CP04-36-000, CP04-41-000, CP04-42-000, and CP04-43-000**

MOTION FOR CONSOLIDATION AND FOR THE INITIATION OF A COMPREHENSIVE, COMPARATIVE EVIDENTIARY HEARING TO IDENTIFY THE PROJECT(S) BEST SUITED TO MEET, SAFELY AND RELIABLY, THE NEEDS OF CONSUMERS IN NEW ENGLAND FOR INCREASED SUPPLIES OF NATURAL GAS

I. Introduction and Summary

The City of Fall River, Massachusetts, and Thomas F. Reilly, Attorney General of the Commonwealth of Massachusetts, hereby move for the establishment of a meaningful procedural format for the consideration of how best to meet the needs of consumers of New England for augmented supplies of natural gas. The fragmented decisional approach now in place is incapable of enabling satisfaction of the controlling public interest standard. If the Commission, and the consumers to whom it owes the ultimate responsibility for sound decisionmaking, is to be assured that New England's need for incremental supplies of natural gas is satisfied in the most sensible, safe fashion, it is imperative that the decisionmaking crucible have the benefit of, and be able to evaluate and select from among, the full panoply of available alternatives. To date, four LNG projects in the New England area have sought import authorizations and, at least in three cases, the certification of associated pipeline expansions.

Inexplicably, notwithstanding their obvious interrelationship, they have been committed to separate decisional tracks. Three other projects, one or two of which with likely earlier in-service dates, have been announced by their sponsors, but the regulatory review processes have not yet been formally initiated.[1] And there may be additional project proposals in the preparatory stage. Further, on April 27, 2005, it was announced that there are plans to expand greatly the pipeline capacity from Nova Scotia to markets in the Northeast precisely to be able to transport incremental supplies of gasified LNG to Massachusetts and other New England states. See press report attached as Exhibit 2.

There is only one way to ensure decisionmaking that in fact would be consistent with the public interest: by the initiation of a single proceeding, consolidating within it the Weaver's Cove, KeySpan, and Broadwater import and related applications,[2] and by publicly inviting the submission by others, by a date certain, of alternative proposals, including proposals for deepwater ports.[3]

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[1] According to the Commission's own web site, in addition to the Weaver's Cove application, there are two other project proposals currently pending before the Commission that could affect supply in the New England market – the KeySpan project intended for Providence, Rhode Island and the Broadwater Energy project, to be located in Long Island Sound between Connecticut and New York, within New York State's waters. In addition, there are two other projects that would be within this Commission's Section 3 jurisdiction that have been identified as potential sites by their project sponsors – a project that would be constructed in Somerset, Massachusetts, and a project that would be constructed near Pleasant Point, Maine. In addition to these projects, there are two offshore projects under consideration that would be subject to the Department of Transportation's jurisdiction (exercised jointly by MARAD and the Coast Guard) – the Tractebel project and the Excelerate project. Tractebel filed an application with the Coast Guard in February 2005, but in March the Coast Guard found that application to be incomplete; Excelerate is expected to file its application as early as the end of this month. See Exhibit 1.

[2] We are serving an informational copy of this Motion in the KeySpan and Broadwater dockets, to ensure that all parties to those proceedings are aware of the action we are seeking.

[3] We are aware that this Commission does not have jurisdiction over natural gas imports (including LNG) through deepwater ports. That jurisdiction has been assigned by the Congress to the Department of Transportation, through enactment of the Maritime Transportation Security Act of 2002, Pub.L. 107-295, § 106, 116 Stat. 2064, 2086,

As described below, such a comprehensive procedure, rather than causing delay, is likely to offer the most expeditious vehicle for the earliest possible introduction into New England of incremental supplies of natural gas, including LNG should that source ultimately prove most beneficial. Indeed, there is nothing at all unique about the procedure that we suggest. It was the procedure of choice mandated by the Commission itself decades ago as it struggled with the need to select, from the available proposed pipeline projects, those most efficacious for the

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amending 33 U.S.C. §§ 1501 *et seq.*, and delegated to both MARAD and the Coast Guard. While the Commission may not usurp the jurisdiction of the Department of Transportation, the Commission cannot fulfill its responsibilities under the Natural Gas Act to determine whether the Weaver's Cove proposal is "inconsistent with the public interest" without fully considering the alternatives to that proposal, including deepwater ports. Inviting proponents of deepwater ports to participate actively in the consolidated hearing we propose in this motion would help ensure that the Commission fulfills its responsibilities under the Natural Gas Act to act on the basis of the public interest by becoming fully aware of the different impacts that the various means of fulfilling the need for energy would have on the affected communities, and it would enhance the likelihood of the Commission's fulfillment of its responsibilities under the National Environmental Policy Act to consider fully viable alternatives. Moreover, we note, that the Commission retains its section 7 jurisdiction over the pipeline interconnections from both on-shore and off-shore LNG terminals.

The comparative hearing that we advocate need not result in jurisdictional friction between the Commission and the Department of Transportation. To the contrary, it is necessary to fulfill the Congress's declaration of policy in the Deepwater Port Act:

> It is declared to be the purposes of the Congress in this Act to-- …(4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law; (5) promote the construction and operation of deepwater ports as a safe and effective means of importing oil or natural gas into the United States and transporting oil or natural gas from the outer continental shelf while minimizing tanker traffic and the risks attendant thereto …."

Where, as here, the affected States have expressed their serious reservations about the on-shore LNG terminal proposals, if not their outright opposition, and where there are plausible proposals for the construction of deepwater ports that could address the same need for natural gas underlying the on-shore proposals, that expression of Congressional policy, including "minimizing tanker traffic and the risks attendant thereto …," would be frustrated if the Commission were to fail to compare the merits and adverse consequences of the Weaver's Cove proposal with announced off-shore alternatives.

It is not necessary that the Commission await Department of Transportation action on those off-shore proposals. The Commission can commence its comparative review, including the required review of the pipeline extensions that would be associated with those off-shore projects, while the Department's processes move forward on their own tracks, thereby ensuring that at the end of the day it will be possible to bring to fruition, at the earliest feasible date, the project or projects most consistent with the public interest.

transportation of domestic natural gas supplies to the centers of consumption, including the Northeast region. If, as it would appear, LNG facilities are now to become a dominant intermediary between sources of production and consumption, the authorization process must be no less rigorous and no less comprehensive.

We now summarize the reasoning, explicated in detail below, that compels the conclusion that as a matter of statutory and decisional law, and of the reasoned exercise of discretion, the procedures that we seek are no more than are required. As an initial matter, it is important that we underscore the position of Movants on the authorization of additional natural gas supplies for New England. The Mayor of Fall River and the Attorney General of Massachusetts yield to no one in their understanding of the absolute essentiality that incremental supplies of natural gas be made available to our consumers. The welfare of their constituents depends upon it; economic development requires it; and environmental preservation and enhancement demand it. They recognize that energy consumption requires the acceptance of unavoidable externalities and their constituents are willing to bear their fair share of those consequences. The Movants are not, therefore, content simply to say "No" or to stand as an obstacle. Rather, they are prepared fully to support those projects which, after careful comparative evaluation, are demonstrated to serve best the citizens that they, and the Commission, are duty bound to protect; projects that best promote the public interest in this new, post 9/11 environment. It is in part because of this commitment that Movants are absolutely certain that the procedure that they advocate, even if it were to require an expansion of the

decisional process, will lead to an earlier in-service date for that project, or for those projects, that are deserving of the Commission's approval and of the support of the affected communities.[4]

Therefore, decisional efficiency alone would counsel embrace of the approach Movants offer, even if it were not required as a matter of law, which it is. First, as a matter of strict statutory construction, it is not possible to segregate on-shore regasification facilities from the pipeline extensions that interconnect them with the interstate grid. There can be no question here that an integral portion of the projects – the pipelines that will carry the gas from the regasification facilities to the interstate pipelines – are in interstate commerce and, as a consequence, require certification pursuant to Section 7 of the Natural Gas Act. Once the need for that review is triggered, the review must comprehensively consider the full implications of the pipeline additions, including the regasification and related facilities and activities that cannot operate as intended apart from that pipeline. That, in turn, requires full consideration in an adjudicatory hearing of alternatives that might avoid any adverse impacts that would be associated with those facilities or activities.

Hence, whether the Commission accepts the view that Section 7 must be applied to all on-shore facets of the Weaver's Cove proposal or not, the practical result, under the statute, is

[4] This filing does not waive or cancel the Motion of Mayor Edward M. Lambert, Jr., to Deny Applications or in the Alternative to Stay Proceedings, filed on September 16, 2004 [and included in file number 20040921-0125]. That motion is based on the Secretary of Transportation's continuing failure to issue regulations prescribing minimum safety standards for the location of new LNG facilities, as required by the Pipeline Safety Act of 1979, *49* U.S.C.A. § 60103. Further, this filing does not waive or cancel any request previously filed by any of the parties to this document.

the same. Nor is the answer any different if it is determined that Section 7 applies only to the required pipeline proposals and Section 3 to the importation and regasification facilities.

As a matter of consistent Commission precedent, evidentiary hearings have been the rule whenever it was the case that material factual issues were in dispute. The need to adjudicate fully the issues inherent in the location and operation of on-shore regasification facilities was embraced fully in Distrigas (Distrigas Corp. et al v. Federal Power Commission, 495 F.2d 1057, 1064 (D.C. Cir., 1974)), decided more than 30 years ago and consistently applied in the interim. Therefore, even if it could be contended that the adoption of adjudicatory procedure represents an exercise of Commission discretion, there can be no justification for abandonment of the rigorous process that has been applied with regularity for more than three decades. Indeed, to do so in a post-9/11 environment in the context of projects that would locate massive regasification facilities in the heart of major, heavily populated Cities and that would require the more than twice-weekly passage of enormous LNG-laden tankers through as many as 32 miles of narrow, congested waterways, would be capricious in the extreme.

There is no excuse for sacrificing fulfillment of the public interest. There is no need for the Commission to delay realization, for the benefit of consumers in New England, of incremental natural gas supplies by insisting on circumscribed procedures that can only serve to prolong controversy. Whether or not the Commission agrees that the procedures Movants here seek are required as a matter of law, it surely has the discretion, as Distrigas makes clear, to

invoke the full panoply of adjudicatory due process.[5] Established precedent and the circumstances here require no less. It would be a total abdication of responsibility and abuse of discretion for the Commission to provide anything less than the comparative trial-type procedure described below.

Decisionmaking today must be refocused in light of 9/11.[6] As Homeland Security Secretary Chertoff has admonished,[7] it is imperative that we vigilantly assess competing risks. As we struggle to meet the post 9/11 challenges, and as we struggle to protect the public from risks already in its midsts, it would be ludicrous to turn a blind eye to the risks, burdens, and benefits associated with each potential location for an LNG terminal, and to the exacerbation of the burdens on our already over-stretched federal, state, and local public safety personnel that each proposal would bring. Yet that is precisely what the Commission would be sanctioning if it proceeds to consider the Weaver's Cove proposal in isolation and without comparing it against credible alternatives that would avoid imposing upon the public risks which, even if small in terms of the likelihood of occurring, carry potential consequences to health and safety that are

[5] Accepting for the moment that the decision whether to hold an adjudicatory hearing is a matter of the Commission's discretion, the Commission should consider the provision in the Energy Policy Act of 2005 dealing with LNG. While the obvious purpose of the provision is to strengthen the Commission's already very strong role with respect to the authorization of import facilities under section 3 of the Natural Gas Act, the provision would explicitly require the Commission to "set the matter for hearing …." H.R. 6, § 320. Failing to do so now – in light of the multitude of strong reasons for holding a hearing on the Weaver's Cove application – would be a serious and inexcusable abuse of discretion.

[6] Comments of Providence Mayor Cicilline offered at the public statement hearing held in connection with the KeySpan proposal, Roger Williams Middle School, January 11, 2005, transcript at 21-24.

[7] See *infra* at p. 25.

horrendous.[8] The very horror of the consequences of a terrorist attack on LNG facilities located in the heart of an urban area is so large that the facilities would become an especially attractive target, increasing the likelihood of occurrence.

Further, the Commission must bear in mind that not all the risks, burdens, and benefits of a potential project would be reflected in market signals. Leaving the locational decision to the market will not lead to efficiency and will not be consistent with the public interest where risks are imposed on the neighbors to the various projects, and where the economic costs, in terms of lower property values and a diminished potential for economic development in areas near the project and even distant from the project but near the shipping route, fall on others beside the project sponsors. The Commission must be cognizant of and take into account the full gamut of "external" costs over the entire life cycle of a proposed facility, and compare those costs to whatever external costs would be imposed by alternatives. For example, the costs of providing security for the LNG terminals and for the LNG ships will become a burden imposed on all levels of Government (Federal, State, and local).[9] These costs must be evaluated and compared, alternative by alternative.

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[8] Further, as noted above, the Congress has declared it the policy of the United States to "promote the construction and operation of deepwater ports as a safe and effective means of importing oil or natural gas into the United States … while minimizing tanker traffic and the risks attendant thereto …." 33 USC § 1501(a)(5).

[9] There will be other indirect (but nonetheless important) costs as well that should be identified, quantified to the extent possible, and compared. For example, operation of Weaver's Cove will almost certainly result in the need to close several bridges to traffic for 10 to 15 minutes at a time whenever an LNG ship goes by. If it is now necessary to do this when there are deliveries to the Everett facility, surely no less will be required with respect to tanker passage that comes within close proximity to population clusters in and around Fall River. Bridges within the City of Fall River that would be affected carry over 100,000 vehicles per day. That will not only impose costs to commuters traveling to and from work, and disrupt normal commerce – imposing real costs that are external to the costs and price signals affecting the Weaver's Cove sponsors, but it will also impose very serious burdens on the population that lives on the other side of the Taunton River, who must have access to the bridges to reach the

II. Whether Viewed in the Context of Section 7 or of Section 3, a Full, Comparative, Adjudicatory Hearing is Required.

1. The Controlling Standard

There is no dispute here that Section 7 is applicable to at least components of the Commission approvals required to effectuate the Weaver's Cove (and the KeySpan and Broadwater) proposal and, in fact, authorization has been applied for under that Section. In the case of Weaver's Cove it is for the construction of two pipeline segments each of which would interconnect with Algonquin. The need to consider the related regasification facilities and supporting activities in the Section 7 decisionmaking format flows directly from the fact that those facilities and activities are tied directly to the requested Section 7 authorizations.[10] It undoubtedly is for this reason that the issue is not even the subject of discussion by the

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hospital facilities available in Fall River. While we assume that emergency vehicles would be allowed to cross bridges during a required closure, the traffic congestion and blockage that results from a closure is likely to result in substantial delay. A 10 or 15 minute delay in the response of an ambulance or in reaching a hospital could mean the difference between life and death. Since these costs are not borne by the private entity deciding whether to construct an LNG terminal in the middle of Fall River, this Commission cannot defer to the marketplace in determining where the public interest lies. Indeed, foisting an LNG terminal that imposes these sort of external costs on an unwilling locality is tantamount to imposing a tax on the local residents, and it is a tax that brings with it no commensurate benefits.

[10] We believe that the better reading of Section 7 is that it applies to the onshore regasification facilities. While this reading was rejected in *Distrigas*, the Commission's failure, in the context of the Weaver's Cove application, to provide a process adequate to permit thorough exploration of the momentous issues and concerns associated with the proposal, would effectively create the "regulatory gap" that the Court in *Distrigas* indicated would give rise to a finding that Section 7 applies *directly* to all of the related onshore facilities. 495 F. 2d at 1063-1064. We preserve the position that Section 7 does apply *directly* should it later prove necessary that the jurisdictional position be pursued. The Commission can obviate the need to deal with that issue by following what had been its practice: broadening the required Section 7 review process to include consideration of Section 3 facilities and activities. *See Sound Energy Solutions*, 107 FERC ¶61,263, at 62,165.

Commission.[11] Rather, applicants have typically filed under both Sections and a unified adjudicatory process has been initiated. As noted by the Commission in its opinion on rehearing in Sound Energy Solutions, 107 FERC ¶61,263, at 62,165: "We typically consider new section 3 import facilities in tandem with section 7 facilities that will attach to the import/export facilities."

The need to examine fully and openly, in a trial-type adjudicatory format, whether the authorization of regasification and related facilities and activities would be consistent with the public interest standard of Section 3, was recognized more than thirty years ago and has been applied consistently whenever material issues of fact were in contention. In Distrigas, the Commission equated the "public interest" standard of Section 3 with the "public convenience and necessity" standard of Section 7 and underscored that the breadth of its prerogatives under Section 3 would permit invocation of whatever procedures, whatever scope of inquiry, the facts of a particular set of circumstances required. The Court of Appeals agreed, articulating the words that have since delineated the broad scope of Commission authority:

> Under Section 3, the Commission's authority over imports is at once plenary and elastic.
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> Distrigas, *supra*, 495 F.2d at 1064.

It is important to reflect on the circumstance presented by Distrigas and on the procedures there invoked for they make the need for an adjudicatory format in the circumstance of the

[11] This lack of discussion is by no means unique to the instant proceeding. Indeed, because of the interrelated authorities under Sections 3 and 7, the "Commission's exercise of section 3 stand-alone jurisdiction … has not always been explicit. This is because we 'commonly consolidated a party's separate applications, reviewing them and deciding upon them jointly.' Since we 'had jurisdiction over both' sections 3 and 7, considering the two sections' authorizations in 'combination clearly provided the Commission with complete authority to decide the full range of issues presented. As a result, neither the [Commission] nor reviewing courts had frequent opportunity to address section 3 directly.'" *Sound Energy Solutions, supra*, at 62,165, *quoting West Virginia v. FPC*, 681 F.2d 847, 856 (DC Cir. 1982).

Weaver's Cove proposal *a fortiori*. The proposals under consideration in Distrigas did not involve the necessity to traverse miles and miles of narrow, heavily populated waterways with gas-laden supertankers and the facilities at issue were intended for *peaking* purposes, with but a handful of shipments required each year (eight in all when full capacity was reached). Distrigas Corporation, Initial Decision, 47 F.P.C. 752, slip. op. at 12 (1971). As peaking facilities, there would be a great deal of scheduling flexibility, permitting deviations in tanker arrivals as dictated by local circumstances and making far more tolerable even a prolonged cessation of deliveries.[12] Moreover, although the Initial Decision described Distrigas' environmental presentation as "scant to the point of being perfunctory", it went on to note that "there are no significant environmental issues, none were raised by the parties, and no person representing any environmental group has intervened." *Id*. at 143. Indeed, the limited interventions that were filed were either on behalf of distributors or LNG importers appearing in support of the applications or domestic producers (two) who stood in opposition. There was no participation, indeed, no apparent expressions at all, from citizens and governmental officials from areas proximate to the proposed facility-locations and "(n)o witnesses were presented by Staff or any of the interveners." *Id*. at 3. As we describe presently, the contrast with the Weaver's Cove proposal could not be more pronounced.

Yet in Distrigas, despite the absence of any local opposition, indeed the absence of any opposition at all except on narrow competitive grounds, the Commission set the applications for hearing before an Examiner and "(e)xtensive oral hearings for the purpose of cross-examination

[12] That the character of operations may since have changed in no way alters the facts that confronted the Commission when it saw a need to subject the applications to the rigors of the full adjudicatory process.

of applicant's witnesses were held in December, 1970," followed by the submission of initial and reply briefs. Id. at 2. Before we describe the starkly different and more compelling circumstances here, circumstances that cry out for the most vigorous trial-type examination, it is important to note that Distrigas does not stand as an aberration. To the contrary, the adjudicatory process that it invoked has been the norm whenever an import application has raised material issues of fact.

Shortly after it considered the Distrigas applications, the Commission had occasion to review the LNG import request of Columbia LNG. For reasons unexplained, the Commission deemed it appropriate to consolidate for hearing and for consideration applications seeking authorization for facilities to be located at parts of the country that are geographically remote from each other: Cove Point, Maryland and Savannah, Georgia.[13] The applications were set for full adjudication before a Hearing Examiner who presided at hearings held "from April 8 to July 8" and then again, in response to amendments modifying the amount of deliveries, "from January 11, 1972, to January 24, 1972." 47 F.P.C. 1624, slip op. at 11-12 (1972). Interestingly, in Columbia the application of Section 7 was not contested and it is the authority that the Commission invoked. In fact, in contrast to the Hearing Examiner, the Commission expressed the view that Section 7(c) certification was required.

In Michigan Consolidated Gas Co. v. Federal Power Commission, 246 F.2d 904 (3rd Cir., 1957), where all that was involved was a pipeline expansion and the export of traditional natural gas via pipeline, and where the controversy was limited to the question of whether those exports,

[13] *Distrigas*, too, was a consolidated review of facilities to be located in Everett, Massachusetts and Staten Island, New York.

which were to be made on an interruptible basis, would reduce the reliability of domestic supply, an evidentiary hearing was held before a Hearing Examiner and the reviewing Court, as had the District of Columbia Circuit in Distrigas, 495 F.2d at 1064, applied the Section 19(b) "substantial evidence" standard. In West Virginia Public Service Commission v. U. S. Department of Energy , 681 F.2d 847 (D.C. Cir., 1982), the Court reversed and remanded a Section 3 authorization because the "factual conclusions vital to the agency's detailed consideration are not supported by substantial record evidence, as they must be." 681 F.2d at 853. There, the Economic Regulatory Administration had "concluded that procedural due process required an evidentiary hearing – which also had been demanded by the intervenors…" and the "prehearing order placed upon the applicants the burden of demonstrating, upon these issues, that approval of the application would be consistent with the public interest." 681 F.2d at 851. And in Midwestern Gas Trans. v. Federal Energy Reg. Comm., 589 F.2d 603 (D.C. Cir., 1978), the Court, agreeing that a hearing need not be held in connection with the grant of limited, conditional import authorization where deliveries were to be through pre-built portions of the Alaska pipeline, cautioned that:

> …final authorization for all aspects of Northwest's import application cannot be granted until the Commission completes proceedings under section 7 of the Natural Gas Act. Therefore, no final order as to Northwest's import application has yet become effective. A hearing must be granted before such final order is considered.

We have found no instance where a hearing was declined where intervenors placed into contention "material issues of fact" coupled with a request for evidentiary hearings.[14] Judicial sanction of refusals to hold evidentiary hearings has been dependent on the Commission's ability to establish the absence of disputed material facts. See New England Fuel Inst. v. ERA, 875 F.2d 882, 886 (D.C. Cir., 1989); Panhandle Producers v. ERA, 822 F.2d 1105, 1113-1114 (D.C. Cir., 1987). The Fifth Circuit expressed the controlling standard for determining when, under Section 3, a hearing is required. After dismissing the notion that a hearing is always required, the Court stated:

> Rather, a hearing is required only when it would tend to enhance the accuracy of decisionmaking; that is, only for determinations of adjudicatory facts.

Panhandle Producers and Royalty Owners Assn. v. ERA, 847 F.2d 1168, 1178 (5th Cir., 1988).[15]

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[14] In the Preliminary Determination on Non-Environmental Issues in *Hackberry LNG Terminal, LLC*, 101 FERC ¶61,294 (December 18, 2002), the Commission did reject the request of two intervenors to adopt any of the enhanced procedures they suggested to address the alleged adverse impacts from increased ship traffic in the Calcasieu Ship Channel. The Commission explained that the concerns about ship traffic "are not a part of our review in a preliminary determination. Thus, we will examine the issues raised … in a final order that evaluates the environmental issues in this proceeding." Id. At 62,180 – 62,181. It is interesting to note that the Lake Charles Harbor and Terminal District, a political subdivision of the State of Louisiana, initially had raised similar concerns with the impact on the operations of the Calcasieu Ship Channel, but it withdrew those concerns after reaching an agreement with the project sponsor involving the payment of "wharfage fees." Those fees will contribute to the infrastructure improvements the District thought necessary to accommodate the increased vessel traffic as a result of the project. In the final order, Order Issuing Certificates and Granting Requests for Rehearing, *Cameron LNG, LLC*, 104 FERC ¶61,269 (September 11, 2003), the Commission briefly discussed the concerns about congestion on the Ship Channel, finding that the "operation of LNG vessels should have a similar impact as other large vessels currently using the Calcasieu Ship Channel and should cause no more disruption than the vessel traffic increases planned by other Channel users." Id. From this, we can only conclude that the Commission did not find that the objections raised a substantial factual dispute requiring the use of a hearing or other enhanced procedures.

[15] While these cases concern review of actions by the Economic Regulatory Administration, rather than by the FERC, they construe the very same authority at issue here – Section 3 of the Natural Gas Act. Indeed, since the ERA is not commonly thought of as an adjudicatory agency, and the FERC is, it is all the more significant that the courts have found that the statute requires the ERA to conduct hearings where material issues of fact are subject to genuine dispute.

This Commission's decision in Sound Energy Solutions, *supra*, is consistent with these legal principles. While the California Public Utilities Commission argued that a trial-type hearing before an administrative law judge was required, this Commission found that "no material issues of fact have arisen to warrant the Commission's ordering such a hearing." 107 FERC ¶61,263, at 62,171.[16] As we now show, it would be a complete abdication of responsibility for protection of the public interest and the wholesale embrace, in its stead, of totally arbitrary decisionmaking to deny full trial-type adjudicatory procedures in response to the Weaver's Cove application. In the context of this case, it would be capricious in the extreme to depart from the precedent of adjudicatory hearings. See West Virginia, surpra, at 861. Indeed, even absent that precedent, it would be an abuse of discretion to fail to do so under the Commission's "plenary and elastic" Section 3 authority.

2. Material Facts Central to a Determination of Consistency With the Public Interest Are in Dispute

It is not necessary to look any further than to the submissions of Weaver's Cove in response to statements offered at the NEPA scoping sessions and to the DEIS, to reach the conclusion that an adjudicatory trial-type hearing is without question required. Weaver's Cove's 220 page "refutation" (referred to hereafter as "WC C at ___"), the additional appendices and other materials that it has submitted, speak eloquently and irrefutably to the conclusion that a

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[16] The Commission cited *Citizens for Allegan County v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969) for the proposition that when "a paper hearing provides a sufficient basis for resolving the material issues of fact in a proceeding, a trial-type evidentiary hearing is not necessary." As shown below, there are numerous material issues of fact in dispute in the Weaver's Cove proceeding. Resolving those material issues requires the use of a trial-type evidentiary hearing.

plethora of very significant material facts and issues are indeed controverted. Moreover, those issues are contested not simply by interested citizens and by Mayor Lambert, but by federal and state agencies speaking in areas of their particular expertise. We are particularly chagrined to note that Weaver's Cove has chosen to respond to Mayor Lambert's effort to discharge his elected responsibility to do all required to safeguard the health and well-being of the citizens of Fall River, with a sharp attack unbefitting the serious Commission undertaking at hand.[17]

Weaver's Cove may feel comfortable dismissing the questions and the objections that are raised as "repetitive" (WC C at 2), but the Commission surely will not be so cavalier. Those questions will continue to be asked by those who have serious, credible concerns, until they are answered adequately in a format that allows full examination of those answers. To categorize the objections as attempts "to slow down the review process" (WC C at 4) shows an utter contempt, both for the most basic notions of due process, and for the very public that the Commission, first and foremost, is duty bound to protect. Indeed, if challenges to underlying motives were probative, it would be appropriate to consider the following statement made by Weaver's Cove in an obvious attempt to circumscribe the exercise of judgment by the Commission and railroad consideration of its application: "It is easy to claim that better alternatives surely exists, yet not one person making these claims has identified such a location, let alone backed it up with any analysis that would prove this" (WC C at 5). Surely Weaver's

[17] We leave to the Commission how best to deal with those personal attacks (for example, accusing the Mayor "of fear mongering" and of "shrill cries" WC C at 15, 145). Mayor Lambert has been seeking one thing all along: a full, fair adjudicatory process so that legitimate concerns of responsible local officials, of affected citizens, and even of federal and state agencies, can be examined in a format that better assures sound decisionmaking in the public interest.

Cove is mindful of the insistence that has been advanced that consideration be given to offshore options, and surely it knows that, at the very least, they represent credible alternatives. Indeed, as we shall discuss presently, at least one and very likely two of those projects can be expected to be on line *before* even the unduly optimistic in-service date claimed for Weaver's Cove ("not…until at least 2008", WC C at 162, although it concedes that the need exists in 2007, Id. at 4).[18]

In a moment we shall turn to the issues that are of most concern: safety, the examination of all credible alternatives in light of the existence of safety issues that can never be completely mitigated, and the unconscionable suggestion that solutions to those safety concerns can be excluded from the Commission's decisionmaking process and dealt with *after* certification has been granted, indeed in some cases after construction has been completed. We are compelled to begin with admittedly important, but less dire issues, because the way in which they are addressed by Weaver's Cove demonstrates contempt for the decisional process. Throughout its Comments, Weaver's Cove is forced to confront the reality that on a wide range of environmental issues, it stands at odds with the expert federal and state agencies. For example:

- with EPA, NOAA and MDMF concerns about impacts on fisheries and marine resources (WC C at 8, 131-134, 140, 143-144);
- with the State's concerns about dredging and sediment disposal (WC C at 45, 68), concerns that are dismissed in back of the hand fashion (WC C at 103);[19]

[18] There are some observations made by Weaver's Cove with which we stand in agreement: that is, the doubts raised about the efficaciousness of the KeySpan project. (WC C at 54).

[19] Even a "non-objector" to the Weaver's Cove project has called for an evidentiary hearing with respect to the proposed disposition of dredging spoils and the impact it might have on the site environmental remediation that is

- with EPA, NOAA and MDEP concerns about the likely impact of the Weaver's Cove project on wetlands and quahog habitat (WC C at 9,116, 120-122,132); and
- with concerns expressed by the Corps of Engineers, in response to the KeySpan proposal, about the implications for safe navigation in the Providence River, about the adequacy of the vessel turning zone, about consistency with coastal zone management planning, and about the impacts on other commercial and recreational boating interests in the river and on Narragansett Bay (KS C at 24-31, 44-45), waterways that KeySpan acknowledges already "are very busy" (KS C at 48).[20]

What is the response given by Weaver's Cove, after a curt dismissal of the concerns on the merits: to complain about "the unfortunate, eleventh-hour shift of positions and issues of certain Federal agencies which are not only signatories of the May, 2002 Memorandum of Understanding, but also submitted in May, 2003 to the Commission's NEPA pre-filing process." WC C at 17-18. Weaver's Cove, in a showing of sheer arrogance, goes on to castigate the federal agencies for their expression of support for the consideration of offshore alternatives. Those questioning federal and state agencies are doing precisely what discharge of their responsibility requires: that they bring credible concerns and options to the attention of the Commission in an effort to help it arrive at reasoned decisionmaking.

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now on-going pursuant to a state-approved plan. Equilon Enterprises LLC d/b/a Shell Oil Products, Motion to Intervene, Protest and Request for Hearing, Docket Nos. CP04-36-000 et al. (January 13, 2004). We certainly agree with Shell that the issue it raises requires full hearing; *a fortiori* safety concerns demand no less.

[20] Indeed, KeySpan inexplicably seizes upon the congestion that already plagues these waterways as justification for being indifferent to the added burden LNG carrier passages will impose. See KS C at 27, 31, 44-45. Not only is this misplaced reliance irrational, it ignores the reality that not all additional traffic imposes the same consequences on local waterways. The *character* of the additional traffic is what is of principal significance. It is one thing to add ordinary, relatively innocuous commercial traffic, it is quite another matter where the addition is of supertankers that require an armed escort flotilla and a wide exclusion zone.

What is most disturbing is the cavalier and dismissive attitude displayed by the Applicant in response to legitimate safety concerns. Weaver's Cove engaged in an *ad hominem* attack on the submission of Dr. Jerry Havens, who addresses, on behalf of the City of Fall River, the risk to the public of LNG pool fires and vapor dispersion. The response of Weaver's Cove is two-fold. In some instances it attacks Dr. Havens' expertise and credibility, and where it is willing to concede his expertise (for example, with respect to the science of vapor dispersion, one of the more significant threats to public health and safety), it endeavors to take issue with the analysis he performed. While Fall River has submitted Dr. Havens' response to the Weaver's Cove attacks, the point here is not to establish where the truth lies on each of the issues addressed in that analysis. Rather it is to demonstrate that critical safety issues are controverted by an acknowledged expert. (See WC C at 6-8, 14, 154-157). It is not open to the Commission at this juncture to accept attacks on credibility until they are established in a hearing crucible. On issues as serious as those addressed by Dr. Havens', it is for a trier of fact to adjudge credibility, following cross-examination of contending viewpoints.[21]

There is one reality that can be offered without fear of refutation: it might be possible to mitigate threats to public health and safety, but never to eliminate them. To its credit, KeySpan concedes as much. KS C at 67. The circumstances at hand may indeed be one of the occasions

[21] No doubt Weaver's Cove will again lament that Mayor Lambert and Dr. Havens' declined to examine certain technical data under the protection of a confidentiality agreement. We expect that the Commission will have little difficulty understanding and being entirely supportive of that refusal. It is no answer to be allowed a peek at safety analyses "under the cover". The public, and the Commission, deserve the assurance that these issues will be ventilated fully in a meaningful hearing. If portions of the analysis require the development of a sealed record owing to public safety concerns (which we seriously doubt due to the currency the materials must already have received), appropriate procedures can be put in place. That can be addressed by the Presiding Examiner when confronted with objections to discovery requests or to efforts at cross-examination.

where the consequences are so great, so prejudicial, that even a remote risk of occurrence is unacceptable, particularly in the face of alternatives that avoid the risk *entirely*. What absolutely cannot be tolerated, however, is blind assurances, no matter how well intended. What cannot be accepted is a decision to proceed to certification leaving to another day consideration of safety issues. Yet that is precisely what both Weaver's Cove and KeySpan ask of the Commission. To accept dismissal of the potential for tanker breaches as "not rational" because Weaver's Cove is willing to rely on the adequacy of current designs (WC C at 165). To accept, as KeySpan urges, "that the probability that a commercial aircraft can be used as a weapon under today's security measures is minimal", because at some informal workshop representatives of the Transportation Security Administration expressed the hope that that was the case. KS C at 75. Let us assume that the risk of breach and the risk that an aircraft once again will be used as a deadly missile is small, but how small, and what might the consequence be if the breach or aircraft strike were to occur during the 26 mile trip (further in the case of Weaver's Cove) through congested inland waterways? How can we possibly know, and how can any responsible official assume, that there will be "ample time" (WC C at 167) to evacuate a one-mile radius around a tanker accident or facility failure when all that Weaver's Cove has done to date is to begin "preliminary work in this area?" *Id*. How can we possibly begin to assess the impacts on local traffic patterns, and perforce on the local commercial and important recreational economies, when no plans have yet been developed and the Applicant labels discussion of this issue as "premature" (WC C at 164)? How can we assess the adequacy and the implications of vessel security zones when they have yet to be offered (WC C at 161-162)? And how can we assess the implications of the "Facility

Security Plan" when Weaver's Cove, in response to the more than understandable request of Senator Jack Reed that it "be finished prior to the Commission's approval of the Weaver's Cove application", dismissively indicates "that Senator Reed may, with the best of intentions, be proposing an approach which is less than optimal" (WC C at 162); when Weaver's Cove suggests that it would be best to hold off that submission until "60 days prior to beginning operations." Id. Indeed, when it suggests that preparing it now would give "a misleading sense of comfort as the Plan became outdated over the next three years." *Id.*

We are constrained to repeat a recurring theme: no matter what may have been technically permissible under FERC regulations, faced with the opportunity to be able to evaluate proposals in the context of alternatives that would lessen significantly, or eliminate entirely, even small risks to the public with consequences, should they occur, bordering on cataclysmic,[22] FERC has but one course of action available to it: the full safety implications and the adequacy of mitigation strategies must be evaluated before the fact, as part of the certification process, and on a comparative basis. It is, frankly, ludicrous for KeySpan to criticize Mayor Cicilline for his concerns about "worst case scenarios" in the face of KeySpan's own recognition that the risk of precisely such an occurrence cannot be eliminated (KS C at 67-68). To say that in the past 45 years of LNG tanker operation "there have been no incidents of LNG cargo tank

[22] The importance of protecting against risks that, while they might have a relatively low probability of occurrence, would generate catastrophic outcomes, recently was discussed by Secretary Chertoff at some length. *See* p. 25, *infra.*

failures, fire or vapor clouds like those commentors fear" (KS C at 68) ignores that for much of those 45 years the Twin Towers stood as evidence of American invincibility.[23]

The fact is that the fears expressed by Senator Reed, by Mayors Lambert and Cicilline, by the Governors, the Attorneys General, and by hundreds of other commentators, are credible. The Sandia Report says as much.[24] We will not burden this filing with an extensive recitation of much in that Report that must be of concern to the parties and to the Commission in this proceeding. Suffice it to say, although acknowledging that mitigation measures can reduce the risk to the public from an accidental or an intentional breach of LNG containment, substantial risks, with potentially horrendous consequences, remain. To cite but one of many facets of the Sandia discussion, with reference to a deliberate attack on an LNG tanker in what the Report describes as a "Zone 1" environment, it states (Report at 74):

> These are areas where LNG shipments occur in either narrow harbors or channels, pass under major bridges or tunnels, or come within approximately 500 meters of major infrastructure elements, such as military facilities, population and commercial centers, or national icons. In these areas, the risks and consequences of a large LNG spill could be significant and have severe negative impacts. Thermal radiation can pose a severe public safety and property hazard and can damage or significantly disrupt critical infrastructure located in this area.

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[23] For KeySpan to offer these assurances comes with particularly poor grace. It already has announced its intent to hide behind "grandfathering" provisions in an effort to insulate its existing 31-year old facilities in Providence from the need to comply with more current safety standards. See Supplement To Comments Of Keyspan LNG, L.P. On Draft Environmental Impact Statement, March 24, 2005. It claims to know better how to protect public safety. Ignoring for now the illegality of KeySpan's position, it surely introduces an array of issues that can only be addressed in an adversary proceeding.

[24] Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water, SAND2004-6258, December 2004, Sandia National Laboratories.

It is as if the authors of the Report wrote those admonitions with Fall River and Providence in mind. Each and every cited threat would be faced from either the Weaver's Cove or KeySpan projects, and each would place thousands of citizens in harms way, not to mention the threat to critical infrastructure and to "icons" of national as well as local significance (for example the Battleship USS Massachusetts and Destroyer Joseph P. Kennedy, which serve as an important tourist attraction in the harbor of Fall River and the India Point Park in Providence). Appended as Exhibits 3 and 4 are pictorial descriptions of the vulnerabilities that would be confronted by either community, and by the many others along the inland water passage route, assuming that the areas of impact were no greater than those described in the Report.[25]

The Report also notes the credibility of several "intentional breach" scenarios, the ensuing and instantaneous danger of conflagration, the danger that "[s]ome intentional damage

[25] As Chief David Costa of the Providence Fire Department expressed to the Commission:

> The Sandia Labs report calls into question the assumption used to calculate thermal radiation and flammable vapor dispersion zones for accidental and intentional breach scenarios used in the Draft EIS. The holes assumed in the Draft EIS are notably smaller than those used in the Sandia report. Changing those assumptions indicates that an LNG pool fire will burn considerably longer than specified in the Draft EIS. Additionally, very serious questions have been raised about the assumptions, science, analysis and calculations used by FERC to reach its conclusions in the environmental impact statements. The questions raised by Dr. [H]avens from Fall River which also apply to the EIS in the proposal in Providence must be carefully studied and the final EIS should await the resolution of these disputes.

Comments offered at the public statement hearing, Roger Williams Middle School, January 11, 2005, transcript at 26. Exhibit 4 includes an aerial photograph of the Weaver Cove site, with a one-mile radius circle drawn around the site. As testimony that the Movants are prepared to offer would show, the impact on human health and safety within that circle from a credible incident would be enormous, and serious adverse effects would extend well outside the area as well. The photograph included in Exhibit 4 demonstrates that the area that would be severely affected includes densely populated residential areas.

scenarios could result in vapor cloud dispersion, with delayed ignition and a fire" or the danger of asphyxiation to populations exposed to the vapor cloud. Report at 37, 73, 134.[26]

The Commission cannot discharge its responsibility for reasoned decisionmaking by confining its evaluation of the Sandia Report to a paper record. It is not possible to be in a position to adjudge where the "truth" lies, where the balance of judgment should be struck, without first subjecting all views (including the vapor dispersion views of Fall River's expert, Dr. Havens'), to meticulous examination in a trial-type format. That format will allow FERC not only to assess the credibility of the witnesses, but also to ensure that the various experts address head on the points made by opposing experts and do not simply "talk past" each other. The FERC has long recognized the essentiality of this process even in areas that unquestionably fall within its expertise, for example to disputes about matters as mundane as the constituents of cost of service ratemaking. We doubt that FERC would claim equivalent expertise with respect to the threat analysis that is so central to its judgment here. Frankly, we doubt that any agency possess that level of expertise today.[27]

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[26] Weaver's Cove offers a curious response to concerns expressed by a commentor concerned about dangers posed by thermal dispersion to a local residential population: "[w]hile the distance that the 5 KW/m^2 flux extends may be accurately stated by Merchant Mills, the point is irrelevant because it does not reflect the DOT's safety regulations." WC C at 158. The point may be "irrelevant" to Weaver's Cove, but it is not to those who care about the preservation of public safety and it must not be irrelevant to the Commission. Even assuming that the danger is dealt with to the extent feasible in the DOT regulations, (which we are willing to assume, but only for the sake of the present discussion), the reality of that residual danger is directly pertinent to the Commission's evaluation of alternatives.

[27] We note that Fall River has previously requested the Commission to conduct an evidentiary hearing on the Weaver's Cove application. The motion requesting the hearing was submitted on September 16, 2004, and has not been responded to by the Commission. It is included along with other documents submitted by the City of Fall River in file 2004092-0125. It there has been any delay in connection with the City of Fall River's request for a hearing, the responsibility for that delay rests firmly at the foot of the Commission. An earlier, very limited request for a hearing confined to exploring reports that the Commission would not take adequate time to examine

Movants are being asked to accept, as a matter of faith, that safety issues need not be of concern. In today's environment they are disinclined to be so trusting or so naive. Safety is not an abstract consideration. Safe, or unsafe, as compared to what? That is the ultimate question that the Commission must resolve. That is the debate that must be waged, not in the abstract but in the only context that is at all meaningful: in a comparative adjudicatory format that fairly examines each alternative on the merits; that looks at the benefits and the warts of each and then arrives at the resolution that best furthers the public interest. Where safety issues are credible, it simply is not possible for the Commission to declare the risks associated with one project acceptable or, in the words of Section 3 as not "inconsistent with the public interest," without simultaneously considering the risks to public health and safety that would be associated with alternatives.

As we consider this question, it is important to be mindful of the words recently offered by Homeland Security Secretary Chertoff in cautioning about the necessity of taking a risk-based approach in decisionmaking:

> That's why we need to adopt a risk-based approach in both our operations and our philosophy. Risk management is fundamental to managing the threat while retaining our quality of life and living in freedom….
>
> The most effective way, I believe, to apply this risk-based approach is by using the trio of threat, vulnerability and consequence as a general model for assessing risk and deciding on the protective measures we undertake.
>
> Here I interject a note of caution because the media and the public often focus principally on threats. Threats are important,

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environmental issues was submitted by the City of Fall River on March 10, 2004. This previous, limited request was rejected by the Commission by order issued April 14, 2004.

> but they should not be automatic instigators of action. A terrorist attack on the two-lane bridge down the street from my house is a bad thing but has a relatively low consequence compared to an attack on the Golden Gate Bridge. At the other end of the spectrum, even a remote threat to detonate a nuclear bomb is a high-level priority because of the catastrophic effect.
>
> Each threat must be weighed, therefore, along with consequence and vulnerabilities.[28]

The fortunate fact is that, assuming the need for incremental supplies of natural gas at a location contiguous to the New England region, there are credible alternatives, indeed alternatives that can meet the need in a more timely fashion. In assessing alternatives the starting point must be to define the need that is to be met. Here we have the benefit of A Report to the New England Governors on Meeting New England's Future Natural Gas Demands: Nine scenarios and Their Impact, by The Power Planning Committee of The New England Governors' Conference, Inc. (March 1, 2005).[29] The Report analyzes a number of supply alternatives, including the Weaver's Cove and KeySpan proposals. If it were appropriate to limit the choice from among only LNG facilities located in the New England region, surely an inappropriate limitation, the Report, if anything, casts significant doubt on the ability of either of the now pending on-shore facility proposals to meet the regional need. The Weaver's Cove proposal, even if it were to be granted all required certifications tomorrow, could not come on line until the Brightman Street Bridge is completely replaced, and the existing structure demolished. The spacing of the piers of the current bridge is not sufficient to provide clearance for LNG tankers.

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[28] Remarks of Secretary Michael Chertoff, Department of Homeland Security, George Washington University Homeland Security Policy Institute, March 16, 2005.

[29] The Report was filed with the Commission in Docket No. CP04-36-000 on behalf of Mayor Edward Lambert on April 1, 2005.

The current Massachusetts Highway Department schedule does not contemplate completion of the new bridge until 2010, with demolition of the old bridge also estimated to be some time in 2010. See Letter from John Cogliano, Commissioner Mass Highway, to Richard Hoffmann, FERC, dated October 13, 2004. (Exhibit 5). In the case of KeySpan, the applicant itself has made clear that there is a construction lead time of almost two years, and this is based on the erroneous assumption that existing facilities would not need to be brought up to current safety standards, notwithstanding that the character of their use would have changed dramatically. The rebuilding of those facilities would add years to the project schedule. Neither of those projects, therefore, appears likely to be able to make the contribution to augmented supply within the period of identified need within the next five years. See Report at 25-31.[30] The third in-region LNG proposal examined in the Report, which would provide the region with a positive peak day supply margin through 2012 (thus comparable to the on-shore facilities, assuming that they could be operational by that date), is the Northeast Gateway project of Excelerate, identified in the Commission Staff analysis to be discussed presently. In a letter filed in the Weaver's Cove docket, Excelerate indicates that it could be operational in New England by 2007. See Letter dated November 16, 2004, filed in Weaver's Cove Energy, LLC Docket No. CP04-36-0000, et al. There is every reason to attach a high level of confidence to this projection. As the Letter points out, "[C]onstruction of the Gulf Gateway project commenced in August 2004, and is expected to be in service by the first quarter of 2005." Letter at 2. In fact, the project went commercial on April 6, 2005. See Press Release, Exhibit 6. It is misleading for Weaver's Cove

[30] The Draft Environmental Impact Statements suggest that need must be met even earlier.

to say, therefore, that, as compared with its project, there are "no other alternatives [that have been] shown to exist." WC C at 9. It is disingenuous for it to cast aspersions on an offshore technology (see WC C at 5, 22, 58-59) that has a proven track record of commercial success. It is, frankly, outrageous for it to dismiss consideration of a truly viable alternative, simply because on the date that Weaver's Cove chose to file its application "there was [then] no announced project off Gloucester." WC C at 60.

Thus, there are feasible and logical alternatives to the locations of on-shore facilities in the heart of congested urban environments. We need look no further than to the map prepared by the Commission's Office of Energy Projects on Existing, Proposed and Potential North American LNG Terminals, as of May 2, 2005. See Exhibit 1. In addition to the Weaver's Cove, KeySpan and Excelerate projects, the map identifies two additional onshore projects (Somerset, Massachusetts, and Pleasant Point, Maine), one additional deepwater port project proposed for offshore New England (the Neptune LNG-Tractebel project), a project in the waters off of Long Island Sound (Broadwater Energy project), and no less than five projects proposed to be located in nearby Canadian Provinces.[31] Moreover, the Staff analysis references only LNG alternatives.

[31] Section 3(c) provides that the importation of LNG "shall be deemed to be consistent with the public interest" for purposes of Section 3(a). As this Commission has forcefully declared, the Energy Policy Act amendments to Section 3 "did not alter the Commission role in assessing technical, safety, and environmental issues relating to the siting, construction, and operation of import facilities." *Sound Energy Solutions*, 107 FERC ¶ 61,263, at 62,167 (June 9, 2004). While the Department of Energy's role in reviewing applications for authorization to import the LNG commodity might well have been rendered *pro forma*, that decidedly is not the case with respect to the level of review required of siting issues by the FERC. The Commission applies "essentially the same criteria to facilities to be used for interstate transactions as for import/export transactions, assessing facilities to be used for domestic gas under sections 4, 5, and 7, and assessing facilities to be used for foreign gas under section 3, imposing the equivalent of our section, 4, 5, and 7 requirements as appropriate." *Id.* To fulfill its obligations under Section 3, then, the Commission must carefully consider the alternatives to the Weaver's Cove project, and as we show below the only way for the Commission to fulfill this obligation is to weigh carefully the impacts of the various alternatives in a consolidated adjudicatory hearing.

Surely sensible regional planning requires consideration as well of all feasible alternatives including the contribution of added incentives for conservation and the possibility of increased pipeline capacity and /or deliveries from both domestic and Canadian sources. We already have referenced the planned expansion of pipeline capacity for the express purpose of bring gasified LNG from Nova Scotia to Massachusetts. See *supra* at p. 2.

It may be appropriate to refer to the National Environmental Policy Act (NEPA), 42 USC §§ 4321 *et seq.*, at this point. Whether a more sensible approach would be the preparation of a "programmatic" or single "region-wide" environmental impact statement, as we think clearly would be the case, has no bearing on what is the Commission's ultimate responsibility under NEPA, as it is of course under Section 3 of the Natural Gas Act: to ensure, in arriving at the necessary determination that certification of a particular project would not be "inconsistent with the public interest", that the Commission has given full and fair consideration to all reasonable alternatives, most particularly to those that have the potential to satisfy the perceived public need without simultaneously imposing on the public horrendous risks to health and safety that are avoidable.

As instructed by the Seventh Circuit in *Simmons v. United States Army Corps*, 120 F.3d 664, 666 (1997):

> No decision is more important than delimiting what these "reasonable alternatives" are. … To make that decision, the first thing an agency must define is the project's purpose. … One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the

> project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.

The DEIS for the Weaver's Cove project seems to give substantial weight to the project "objective" of providing LNG deliveries by truck to the peakshaving market, and to use that "objective" as a basis for discounting the offshore alternatives. *See, e.g.*, DEIS at p. 3-9. While it would certainly be a legitimate project purpose to assist in meeting New England's need for peak capacity, alternatives cannot be rejected because each individual project does not by itself satisfy each individual objective. In this case, offshore facilities can substantially augment New England's need for more natural gas, freeing up more of the capacity of the existing Everett and KeySpan facilities to serve as a source for truckload deliveries of LNG to satellite storage facilities throughout New England. That the offshore facilities themselves could not be the source of truckload deliveries of LNG is simply irrelevant to any reasonable consideration of whether alternatives can meet the purposes that could be served by the proposed action.[32]

While NEPA does not mandate that a hearing be held, it in no way diminishes the Commission's obligation in its administration of its Section 3 responsibilities to utilize the procedures essential to sound decisionmaking. NEPA cannot possibly be understood to have diminished the Commission's obligations in this regard.

No one challenges the requirement that the Commission consider the implications of the Sandia Report. The question is how? Is it best to do it behind closed doors without the benefit of probing, adversarial expert examination? Is any process short of adherence to the full rigors of trial-type analysis, with the safety implications of proposals compared one against the other,

[32] Moreover, as the Broadwater proposal demonstrates, some off-shore projects can provide storage options.

suited to arrive at the exercise of judgment that best serves the public interest? Most assuredly not!

III. A Comprehensive, Comparative, Open-Access Type Adjudicatory Hearing is Required if the Commission is to Satisfy the Section 3 Public Interest Standard

Assuming acceptance of the need for an adjudicatory process conducted in full conformity with the Commission's regulations governing trial-type hearings, 18 CFR 385.501, it still remains to consider whether the Commission can fulfill its responsibilities under Section 3 if it fails to consolidate the Weaver's Cove, KeySpan, and Broadwater applications (whether filed pursuant to Sections 3 or 7) and, beyond that, fails to invite the participation of all others who are considering projects that would serve the need of the New England region for incremental supplies of natural gas, for review in a comparative evidentiary hearing. The short answer is that it cannot.

In the decades that preceded deregulation, when distributors were tied to pipelines and pipeline costs were underwritten by cost of service ratemaking, the Commission recognized the necessity of subjecting alternative pipeline supply proposals to the rigors of comparative analysis. It implicitly recognized that it could not meet its public interest responsibility to support only the most cost effective projects by the isolated consideration of applications in their order of submission. The Commission not only consolidated proposals to supply the same regional market, it aggressively solicited others that may be waiting in the wings. See, e.g., Northeast U.S. Pipeline Projects, 44 FERC ¶ 61,150 (1988). Deregulation and unbundling may have reduced the economic imperative for the insistence on a process that assures the selection of

the project or projects that best would further the public interest, but new imperatives, unfortunately, have come to the fore, with consequences to the public far more severe than the potential of being saddled with unnecessary economic costs.[33]

The world really did change on 9/11, and the consequences of that change stand today as *the* most important component of public interest analysis dwarfing everything else that, in years past, occupied so much of the Commission's attention. As every new proposal is put forward there now is, by necessity, the need to ask an overriding *comparative* question: will implementation of the proposal carry risks to public safety that could be avoided by the selection of some other option? *It would be patently " inconsistent with the public interest," the operative Section 3 standard, were the Commission to certify a project that has the potential to introduce an horrific threat to public safety particularly where there are safer alternatives available.* Instead, the Commission is obliged to utilize the full breadth of its "plenary and elastic" Section 3 authority (Distrigas, 495 F.2d at 1064) to formulate whatever procedures may be necessary to assure that threats to public safety are minimized as we strive to satisfy incremental regional energy needs.

In so stating what we view to be the Commission's unavoidable responsibility we are not at all unmindful of the burden imposed by the Ashbacker doctrine (Ashbacker Radio Corporation v. FCC, 326 U.S. 327 (1945). Nor do we challenge its *threshold* applicability. But the "mutual exclusivity" standard articulated by the Court in the relatively benign setting of 1945, and in the context of projects that imposed only economic consequences, no longer is the totality of the

[33] This is not to suggest that economic issues are of no relevance. Indeed, premature certification of a project could diminish the willingness of sponsors to move forward with an alternative that would present far fewer risks to public health and safety.

required analysis. The "public interest" standard, whether stated in positive terms or in the "not inconsistent" with articulation of Section 3, has long been understood to encompass the consideration of all factors, be they economic, environmental, or, of course, *safety*.

This analysis leads to but one conclusion: the Commission cannot meet its Section 3 responsibilities in the Weaver's Cove proceeding absent a comprehensive, comparative, trial-type hearing. "Inconsistency" with the public interest cannot be determined in the abstract. At least where safety to the public is a bona fide concern, the determination can only be made by the comparison of alternatives. When putting in place procedures designed to encourage the filing, in a single proceeding, of all projects with a potential for providing incremental natural gas service to the Northeast (including but not limited to New England), the Commission noted that "(t)he densely populated nature of the Northeast U.S. puts a particular premium on careful environmental planning and consultation…." 52 FR 36613 (September 30, 1987) at 3. In an earlier order in that proceeding, the Commission established a process for the consolidated consideration of all "new applications to provide natural gas service to the Northeast U.S." 52 FR 28863 (August 4, 1987) at 2. The Commission was not content, however, to consolidate all applications already pending: it established an "open season" inviting filings by other potential applicants, allowing almost four months for the preparation and submission of those filings.

If this is the case in a Section 7 context, where the concerns primarily are economic, *a fortiori* it is the case in this Section 3 context. As the Commission observed in Atlantic Richfield Company and Intalco Aluminum Corporation, 49 FERC 61,294 at 62,109 (footnotes omitted):

> The Commission's jurisdiction under section 3 is not insubstantial. The Commission's jurisdiction 'is at once plenary and elastic.' Furthermore, as noted

> by Cascade, "Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power – flexibility far greater than would be the case [if] imports [were held to be] interstate commerce, automatically and compulsorily subject to the entire panoply of Section 7's requirements."

That flexibility clearly extends to "imposing the equivalent of … section 4, 5, and 7 requirements as appropriate." Sound Energy Solutions, *supra at* 62,167. In a post-9/11 environment the Commission's authority – indeed, its obligation -- surely embraces consideration of comparative risks to public safety under a "public interest" standard.

Were this not enough, there is the Commission's responsibilities under NEPA, and in particular the requirement that the Commission consider all reasonable alternatives that could lessen the adverse impact on the human environment. 42 USC § 4332(2)(C)(iii). It is no answer to say that this responsibility can satisfactorily be discharged by including within the separate Environmental Impact Statements to be prepared for the Weaver's Cove, KeySpan, and Broadwater proposals, and even those to be prepared for the pipeline expansions associated with deepwater off-shore projects, a discussion of "alternatives", even if that discussion is seemingly comprehensive and "considers" offshore and pipeline expansion alternatives. When dealing with the novel post 9/11 safety issues that are here so prominent, it would be the height of folly to assume the sufficiency of a "paper record" analysis. The Commission can only be in a position to make sensible judgments, to make the required "not inconsistent with the public interest" findings, after having the benefit of a rigorous trial-type adjudication.

It is relevant if one proposal would place a sizable segment of the population, would place schools and places of public assembly, would place popular and heavily attended tourist

attractions, within the immediate zone of instantaneous conflagration, while another proposal would avoid all of those dangers. It is relevant if one proposal or combination of proposals would require the almost daily navigation by gas-laden supertankers of extensive, narrow, congested waterways, virtually closing them to other commerce and recreational use, while an alternative would avoid those prejudices. It is relevant if one proposal or combination of proposals would impose enormous and as yet unquantifiable economic costs on federal, state and municipal governments as they struggle to ensure the safety of on-shore facilities and the safe passage of supertankers through populated, congested waterways, not to mention the costs imposed on local economies as the need to disrupt traffic patterns arises, and alternatives do not.[34]

It no longer is sufficient for the Commission to proceed with certification content to assume that other agencies with safety responsibility will do their jobs. Even if it were to be assumed that both the Coast Guard and the Department of Transportation will do all that is feasible to minimize the danger to public safety,[35] the fact remains that in today's environment those requirements will impose enormous societal costs and, most significantly, no matter what those agencies may impose, *a significant risk to public health and safety will remain.*

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[34] It is of no consequence that certain aspects of the required consideration involve facilities and/or activities that may be beyond the jurisdiction of the Commission. As the Commission itself recognized, "NEPA requires [it] to consider the environmental impact of nonjurisdictional facilities which are directly related to Commission action." *Atlantic Richfield Company and Italco Aluminum Corporation*, 49 FERC 61,294, 62,111 (1989).

[35] Moreover, as Fall River has made clear in submissions filed with both the Coast Guard and with the Department of Transportation, the current regulatory regimes are grossly inadequate when it comes to protecting public safety. See Exhibits 7 and 8.

It therefore is incumbent upon the Commission to await promulgation of those safety requirements so that, as part of the certification process, it may consider the costs and the unavoidable residual risk. It is incumbent upon the Commission to await completion of the Final Environmental Impact Statement and to subject it, and the safety conditions imposed by the Coast Guard and by DOT, to full examination in an adjudicatory process that permits evaluation of the Weaver's Cove proposal in the context of the available alternatives.

This is especially the case here as there are alternatives.

Movants understand that the Commission has no ability to force the filing of applications against the wishes of anticipated sponsors. They understand that the Commission cannot force unwilling developers to come to the table. But it no longer is sufficient for the Commission to merely await the filings of the private sector. It no longer is sufficient to consider applications based only on the order of submission. It now is incumbent on the Commission to be pro-active just as it was during the period of aggressive pipeline expansion. If it in fact is the case that certification of one of the already announced off-shore proposals would meet regional needs until 2012, it is obvious that a second off-shore facility, or the completion of even one of the identified Canadian proposals, would secure regional supplies for several years more. At a minimum, and even if we indulge the assumption that at some point in time the expansion of on-shore LNG capability will become necessary, an assumption that we offer only to make the point that should be obvious: it behooves us to "buy time" permitting the evaluation of risks as we gain greater insight into, and experience in, fighting the war on terrorism.

As a Nation we struggle daily to safeguard from terrorist attack the vulnerabilities already in our midst. The chemical installations, powerplants, nuclear waste repositories, major elements of our everyday infrastructure. The challenge already posed by what is now there is formidable enough. That is not to say that we must never accept the introduction of new risks. Of course that is unacceptable. But as Secretary Chertoff has reminded us, risks are relative, and not all risks have the same level of potential adversity. Even if it was never before the case, the Commission absolutely cannot proceed with the certification of regasification facilities to be situated in the heart of urban centers without first examining fully and openly all of the safety implications and by comparing those risks against all credible alternatives. The decisionmaking process must reflect the post-9/11 world that now is our every day reality.

IV. Conclusion

The words of the Second Circuit, spoken 40 years ago, are particularly apt in the face of applications that pose such serious questions and that call for resolutions so critical to preservation of the public interest:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling the balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

Scenic Hudson Preservation Conf. v. Federal Power Comm., 354 F.2d 608, 620 (2nd Cir., 1965), cert. denied 384 U.S. 941 (1966).[36]

[36] There is an interesting parallel with *Scenic Hudson*. There, too, the Commission was being asked to authorize development of a large energy supply project in the face of intervenor suggestions that there were alternatives. The Court spoke to the Commission's obligation to fully and fairly consider all reasonable alternatives years prior to the

Movants do not, however, seek to place the burdens just on the shoulders of the Commission. In fact the only significant burden we ask the Commission to accept is the invocation of a disciplined adjudicatory process. The burden of satisfying the Section 3 standard rests with the Applicant, a fact that the Commission may wish to emphasize. For our part, Movants pledge their active involvement. Given the opportunity to do so, Movants intend to benefit the Commission, and the decisional record, with the analyses and presentations of experts they intend to offer as witnesses. Those experts will address, among other issues central to resolution of the public interest determinations that the Commission will be called upon to make, safety implications associated with operation of the onshore facilities and with the inland waterway passage of LNG supertankers; both the implausibility of preventing threats to public safety and the impossibility of assuring safe evacuation in the event of an accidental or intentional spill; implications of required security precautions on regional development, infrastructure, recreational, commercial and residential resources; and the availability of alternatives that can meet New England's need for incremental supplies of natural gas without simultaneously subjecting the region to unacceptable levels of risk.

Accordingly, it is incumbent on the Commission, and we so move:

- That it consolidate the Weaver's Cove, KeySpan, and Broadwater Section 3 and 7 applications;

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enactment of the NEPA, and in a case where the predominant public interest concerns were aesthetics. 354 F.2d at 612-613. Moreover, the alternatives to be considered were beyond the jurisdiction of the Commission to effectuate. There is a disturbing dissimilarity from *Scenic Hudson*: instead of acting as an umpire blandly calling balls and strikes, the Commission here (particularly in its analyses of the alternatives) seems more like one of the fans.

- That it announce an “open season” inviting proposals for additional supplies of natural gas to the New England region by a date certain;
- That it direct the completion of the Final Environmental Impact Statement;
- That it direct the submission by Weaver’s Cove and by the sponsors of alternatives, of a complete enumeration of the safety requirements that will apply, including, as applicable those to be imposed by the Coast Guard and by DOT and the additional steps that will be required to assure safe passage of the supertankers through the waters of Rhode Island and Massachusetts; and

- That it declare that the certification process will be governed by the procedures applicable to trial-type adjudicatory proceedings and that the comparative hearings will commence following the submission of the information noted above and the completion of reasonable discovery.

Respectfully submitted,

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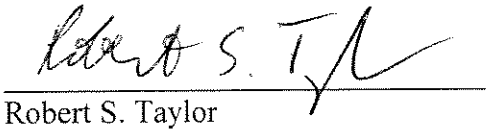
Dated: May 11, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person listed on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, DC this11th day of May, 2005.



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